Filed 12/31/12 Nancy T. v. Corey Q. CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

NANCY T. et al., Plaintiffs and Appellants, v. COREY Q., Defendant and Respondent.	A131991 (Contra Costa County Super. Ct. No. D0803610)

S.Q.'s mother died in 2007. S.Q.'s father, Corey Q., now has sole custody. Father's relationship with S.Q.'s maternal relatives is strained, at best. The maternal relatives—grandmother and appellant Nancy T., great grandmother Nelle F., uncle Anthony N., and aunt Linda N.—petitioned the family court for ordered visitation with S.Q. The family court denied the petition; we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2007, S.Q., then two years of age, lived with her mother. S.Q.'s mother, who had sole physical custody, died on September 23, 2007. Afterwards, there was no provision for S.Q. She was placed briefly in foster care. Then she resided with her maternal uncle for several weeks until Child Protective Services contacted her father. As of October 10-19, 2007, S.Q. was placed with her paternal grandmother, after which father obtained custody by order of the El Dorado County Superior Court.

On August 1, 2008, S.Q.'s maternal grandmother, great grandmother, aunt, and uncle filed a verified petition with the family court seeking ordered visitation with S.Q.

under Family Code section 3102.[1] They asserted each had forged a bond with S.Q. such that ongoing visitation was in S.Q.'s best interest. They further asserted father had denied them visitation.

On February 27, 2009, the maternal relatives supplemented their petition with a motion for visitation. The motion specified they sought visitation with S.Q. from Friday night to Sunday night of the first, third, and fifth weekends of every month. The motion also specified they sought to have S.Q. on every New Year's Eve and New Year's Day, the deceased mother's birthday, half of summer break, and half of other holidays (these on a rotating, odd year, even year schedule). In addition, the maternal relatives' supporting declaration elaborated on their reasons for lacking trust in father—that he walked out on mother and S.Q. when S.Q. was one, he had been imprisoned at the time of S.Q.'s birth, and he had a violence issue and had threatened to kill mother.

Father opposed the petition and motion, stating in a declaration he could allow the maternal grandmother and S.Q. to enjoy a relationship, but only so long as he, as parent, retained discretion to control the relationship's development. He was concerned the maternal grandmother was making unreasonable demands for time with S.Q. and disparaging him to S.Q. Father admitted he had, in the past, been convicted of "unruly behavior and other crimes" but said he had completed a year-long domestic violence training program, and asserted most of the maternal relatives' accusations were unfounded and arose from an attempt to steal S.Q. away from him. He also pointed out grandmother, herself, had been in federal prison on drug charges from before S.Q.'s birth, having filed her section 3102 petition while incarcerated but with the prospect of release within several months.

[1] All further statutory references are to the Family Code unless otherwise indicated.

A confidential mediation report prepared April 28, 2009, recounted the parties' stories and positions and made three recommendations: (1) prohibit derogatory comments about relatives in front of the child; (2) prohibit discussions of family court litigation in front of the child; and (3) father and maternal relatives should keep each other updated on their contact information. The mediator did not recommend court-ordered visitation.

After several delays, the family court held a hearing on visitation on March 16, 2011. Grandmother attended and testified mother had brought S.Q. to the Dublin prison facility "[a]lmost every weekend" to visit her until mother died in 2007. Then, the maternal uncle brought S.Q. for two weekend visits and mother's memorial service, which grandmother attended. After the memorial service, grandmother had no physical contact with S.Q. until after leaving prison in 2010, over three years later, but she would send notes and gifts to S.Q. Grandmother last saw S.Q. in March 2010 when father brought S.Q. to a party. After that, there was some phone contact, but grandmother accused father of trying to stop that avenue of communication. When asked why ordered visitation would be in S.Q.'s best interests, she stated "it's really important for [S.Q.] to know her mother through us." Grandmother said she wanted to work with father to repair the tension between them.

Uncle testified he and his daughter and mother and S.Q. would meet every few months before mother's death. Afterwards, he had custody of S.Q. for parts of September and October 2007. He only saw S.Q. again at the March 2010 party. Aunt—not uncle's wife, but mother's half-sister—saw S.Q. at some family functions. She last saw S.Q. at the 2007 memorial service.

Father testified he was not trying to keep S.Q. from grandmother, but trying to deal with what he viewed as grandmother's intrusiveness, and her demands for visits with S.Q. on her terms. Father, for example, testified grandmother regularly demanded he bring S.Q. to her home in Livermore. As another example, father stated the March 2010 party was supposed to be a small, quiet meeting, not a big party that could disorient S.Q.;

though grandmother said father knew it was going to be a big gathering and could have rescheduled. Father also testified he wanted to wait for S.Q. to get older so she could make her own choices about how to relate to grandmother. He said he was not preventing contact and was allowing phone calls.

The court denied the maternal relatives' petition from the bench and issued a written order on March 18, 2011. The court denied visitation to the great grandmother because she failed to appear for the hearing. It denied visitation to the aunt and uncle because they had no recent contact with S.Q. As to the grandmother, it found visitation was not in the child's best interests because she had been incarcerated in federal prison at the time of S.Q.'s birth through 2010 and had minimal contact with S.Q. after S.Q.'s mother died; the grandmother displayed hostility toward father in pleadings and in court that, if expressed during visits with S.Q., could harm the child; the grandmother evidenced little knowledge of the needs of a child of S.Q.'s age; and the father was willing to facilitate visits if grandmother would change her actions and attitude.

The grandmother filed a notice of appeal on May 11, 2011.

DISCUSSION

Family Code section 3102 provides: "If either parent of an unemancipated minor child is deceased, the children, siblings, parents, and grandparents of the deceased parent may be granted reasonable visitation with the child during the child's minority upon a finding that the visitation would be in the best interest of the minor child." (§ 3102, subd. (a).) Section 3102 may not, however, be read to indiscriminately deprive parents of their right to raise their children as they see fit. (See *Troxel v. Granville* (2000) 530 U.S. 57.) A parent's death does "not imbue" her surviving relatives with her "parental rights or diminish [a surviving spouse's] parental rights." (*Kyle O. v. Donald R.* (2000) 85 Cal.App.4th 848, 863 (*Kyle O.*).) And "[n]othing in the unfortunate circumstance of one biological parent's death affects the surviving parent's fundamental right to make

parenting decisions concerning [his or her] child's contact with" the deceased spouses' relatives. (*Ibid.*)

Thus, courts generally presume a surviving parent, if fit, makes correct visitation decisions. (*Rich v. Thatcher* (2011) 200 Cal.App.4th 1176, 1180-1181 (*Rich*); *Kyle O., supra,* 85 Cal.App.4th at p. 863.) Relatives of a deceased parent rebut this presumption only with clear and convincing evidence that denial of visitation would be detrimental to the child. (*Rich, supra,* 200 Cal.App.4th at p. 1181.)

In addition, a court may not presume "that grandparent-grandchildren relationships always benefit children." (*Zasueta v. Zasueta* (2002) 102 Cal.App.4th 1242, 1253-1254, italics omitted.) " 'In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision . . . becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.' " (*Id.* at p. 1253, italics omitted, quoting *Troxel, supra,* 530 U.S. at p. 70.)

The decision to grant or deny visitation under section 3102 is discretionary, and we review it under the deferential abuse of discretion standard. (*Rich, supra,* 200 Cal.App.4th at p. 1182.) " ' "[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling . . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only ' "if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did." ' " ' " (*Id.* at p. 1181) " ' "The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." [Citations.]' [Citations.]" (*Ibid.*)

With this background, we consider grandmother's arguments.

First, grandmother claims the family court judge acted improperly by accepting a copy of the father's new cookbook, which grandmother claims father offered the judge at the conclusion of a February 15, 2011 hearing. According to grandmother, the family court judge should have recused herself under Code of Civil Procedure section 170.3. But grandmother does not point to any record evidence tending to show this interaction ever occurred. A review of the February 15, 2011, hearing transcript discloses nothing of the sort. Appellant must provide an adequate record demonstrating error or face defeat on appeal. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.) In any event, grandmother cannot raise Code of Civil Procedure section 170.3 for the first time on appeal. That section requires a complaining party to file a written, verified objection in the trial court (Code Civ. Proc., § 170.3, subd. (c)(1)), and states the "determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate . . . within 10 days after . . . of the court's order determining the question of disqualification" (*id.*, § 170.3, subd. (d); *People v. Panah* (2005) 35 Cal.4th 395, 444 [not reviewable except by writ]). Grandmother neither filed an objection in the trial court nor sought writ review. We cannot consider her complaint now.

Second, grandmother claims the family court excluded her evidence that S.Q. and she had formed a close bond, namely a collection of photographs showing S.Q. with her maternal relatives. Although the family court declined to view all of the photographs during the visitation hearing, it invited grandmother to select a page from her album which it would, and did, review. Given its review of some photographs and the availability of grandmother, aunt, and uncle to offer detailed testimony about the relationship they each formed with S.Q., the trial court was within its discretion to exclude the remaining photos under Evidence Code section 352. (See *People v. Michaels*

(2002) 28 Cal.4th 486, 532 ["photographic evidence is often cumulative of testimonial evidence"].)

Next, grandmother advances arguments on behalf of the aunt and uncle and on behalf of the great grandmother. We reject these arguments in the first instance because only grandmother has filed a notice of appeal, and only grandmother has signed a brief on appeal. Although grandmother purports to represent the other maternal relatives, she is not a lawyer, and she may not do so. (*Roddis v. All-Coverage Insurance Exchange Automobile & Fire* (1967) 250 Cal.App.2d 304, 311 ["A person who is not an attorney authorized to practice law in this state cannot represent anyone other than himself."]; cf. *In re Gordon J.* (1980) 108 Cal.App.3d 907, 914 [juvenile not entitled to have father assist him in his defense or represent him since father was not member of the bar].)

Regardless, grandmother's arguments concerning the other maternal relatives are meritless. As to the aunt and uncle, grandmother contends the family court erred when it denied them visitation based on their indisputable lack of recent contact with S.Q. Subdivision (b) of section 3102, however, *instructs* the family court to "consider the amount of personal contact between the [family member] and the child" when the family member is "other than a grandparent of the child." As to the great grandmother, grandmother contends the trial court should not have "dropped" her from the case when she did not appear in court. Yet, grandmother herself explains the problem in her brief, noting the great grandmother "is 78 years old and not well enough to endure the all-day trip to court." The family court was well within its discretion to conclude that ordering visitation with a person facing such personal challenges was not in S.Q.'s best interests.

Finally, grandmother asserts the family court did not allow her to present all her evidence, did not fully credit her testimony, and did not properly discredit father's testimony. Yet the court, although often interjecting questions to direct the flow of testimony, did not prevent grandmother from making her case. Grandmother complains, for example, she was not allowed to present evidence of father's alleged unfitness, but

she does not adequately explain how the court stopped her, or, put another way, she does not point to an instance in which she tried to offer this testimony and the family court refused it. (See *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1387 ["evidentiary objections cannot be raised for the first time on appeal"]; *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 329 ["failure to make an adequate offer of proof precludes consideration of the alleged error on appeal"].) Further, she, in her brief, makes accusations against father, presumably to support her unfitness assertion, but does so without supporting those accusations with citation to the appellate record.[2] (*Aguilar v. Avis Rent A Car System, Inc.*, *supra*, 21 Cal.4th at p. 132 [adequate record required on appeal].) Moreover, the family court, as trier of fact, was the arbiter of credibility. (See *Strong v. State* (2011) 201 Cal.App.4th 1439, 1452-1453.) The family court appears to have credited father's testimony about the maternal relatives' interference with his parenting and the benefits and possibility of a less-structured approach to visitation. As a court of review, we do not reweigh the evidence and "will not disturb this credibility determination" on appeal. (*Ibid.*)

We see no abuse of discretion in the trial court's denial of visitation orders.

DISPOSITION

The order denying visitation is affirmed. Father shall recover costs on appeal.

[2] For example, she references a DVD she "would have presented to the Court" with videos father has allegedly recorded and published on YouTube that, she claims, take a pro-drug and anti-law-enforcement tone. But there was no mention of this DVD in the proceedings below. If circumstances materially change or new evidence, truly unavailable at the time of grandmother's petition, comes to light, we see nothing in section 3102 prohibiting a subsequent petition based upon these changed circumstances or new evidence. At the same time, we caution successive petitions attempting to rehash the evidence that was before the court would be improper.

_____
Banke, J.

We concur:

_____
Marchiano, P. J.

_____
Margulies, J.